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No.

IN THE

Supreme Court of the United States

October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,

Petitioners,

v.

WALTER ROBERT TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MONBLEAU, VERMEIRE & TURLEY, P.C.
By Albert R. Vermeire, *Counsel of Record*
3443 North Central Avenue, Suite 1510
Phoenix, Arizona 85012
(602) 263-0532
Attorneys for Petitioner Howard

LOONEY, NICHOLS, JOHNSON & HAYES
By John B. Hayes, *Counsel of Record*
P. O. Box 468
Oklahoma City, Oklahoma 73101
(405) 235-7641
Attorneys for Petitioner Trauscht

QUESTIONS PRESENTED

1. ARE PURELY PRIVATE CONSPIRACIES TO VIOLATE FIRST AMENDMENT RIGHTS ACTIONABLE UNDER 42 U.S.C. § 1985(2)(3)?

2. WHETHER UTILIZATION OF A STATE COURT TRIBUNAL BY PRIVATE PERSONS CAN CONSTITUTE ACTIVE STATE PARTICIPATION SO AS TO SATISFY THE REQUIREMENTS OF 42 U.S.C. § 1985, WHERE THE STATE ACTOR IS NEITHER A DEFENDANT NOR ALLEGED TO BE PART OF THE UNLAWFUL CONSPIRACY, OR AN ACTIVE PARTICIPANT THEREIN?

3. WHERE THE RIGHTS ALLEGED TO HAVE BEEN VIOLATED ARE THOSE WHICH ARISE UNDER THE FIRST, FOURTH, FIFTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND NOT THE RIGHT TO BE FREE FROM RACIAL DISCRIMINATION (THIRTEENTH AMENDMENT) OR OF INTERSTATE TRAVEL, AND THE SOURCE OF CONSTITUTIONAL POWER IS ONLY THE FOURTEENTH AMENDMENT, WHAT DEGREE OF STATE PARTICIPATION (IF ANY) IS REQUIRED UNDER 42 U.S.C. § 1985?

PARTIES

In the United States Court of Appeals for the Tenth Circuit, the parties were: Walter Robert Taylor, appellant, and Wayne N. Howard, Michael E. Trauscht, Joseph Alexander, Esther Alexander, Kevin M. Gilmartin, Gary Scharff and the Freedom for Thought Foundation, Inc., appellees. All of these parties have an interest in the filing of this petition.

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WAYNE N. HOWARD and MICHAEL E. TRAUSCHT, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit in the entitled case rendered on July 30, 1982.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. In his Memorandum of Decision and Order filed December 30, 1978, United States District Court for the Western District of Oklahoma, Fred J. Daugherty, Judge, granted the Motion for Summary Judgment of Petitioners stating that there was no action under color of state law by Defendants nor was there any conspiracy with a state actor alleged, nor that degree of active state participation so as to preclude summary judgment on the federal questions. Summary judgment was entered against Respondent on all federal questions, respectively, in the Memorandum of Opinions appearing in the Appendix hereto.

Certain state tort counts remained after Judge Daugherty's action and the case was tried to jury with directed verdict motions as to some state tort counts being granted and a jury verdict as to the remaining state tort count being received and made part of the Judgment on Jury Verdict entered on January 16, 1981. An appeal from the Judgment on Jury Verdict and the summary judgments issued on the federal questions was taken by Plaintiff to the United States Court of Appeals for the Tenth Circuit, which Court, by opinion rendered July 30, 1982, affirmed the Judgment of the District Court under 42 U.S.C. § 1983, but reversed the

Judgment of the District Court and remanded the cause for further proceedings consistent with the Opinion as to the claims which arise under 42 U.S.C. § 1985(2) and (3).

JURISDICTION

This is a controversy founded upon Plaintiff's assertion of causes of action arising under 42 U.S.C. § 1985(2) and (3). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1985(2): "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand jury or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

§ 1985(3): "If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or properly on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

Plaintiff, WALTER ROBERT TAYLOR, alleged that he was the subject of a religious deprogramming by the Defendants as a result of his membership in a cult. WAYNE N. HOWARD acted as an attorney for the Plaintiff's parents and applied to the Probate Court in Oklahoma City County, Oklahoma, for orders of temporary guardianship over the person of the Plaintiff. After the proposed ward was brought before the Probate Court judge, he issued orders of temporary guardianship, placing the Plaintiff in the custody of his father.

Ten days of counseling followed which Plaintiff characterized as "deprogramming". After returning to the cult, Plaintiff instituted suit against his parents, two attorneys, a psychologist and certain private persons who served as lay therapists. Plaintiff did not join any state actor or a state agency as a defendant, nor did he allege active participation or a conspiracy with any state actors to deprive him of any constitutional freedoms.

In ruling upon the Motions for Summary Judgment filed by all Defendants, the United States District Court for the Western District of Oklahoma held, with respect to the questions here presented, that the mere utilization of the state judicial process did not constitute state action under 42 U.S.C. § 1983. Furthermore, Judge Daugherty held that since the rights alleged to have been violated arose under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, with no allegations of racial discrimination or interference with interstate travel, the source of power to reach the conspiracy was the Fourteenth Amendment. The District Court then found no evidence of active state participation, connivance or shared motives, and entered summary judgment as to all federal questions, Appendix at 100-13.

The United States Court of Appeals for the Tenth Circuit, by Opinion dated July 30, 1982, disagreed and reversed as to the questions which arose under 42 U.S.C. § 1985. Acknowledging that the Appellant did not claim active state participation in the conspiracy to deprive him of his constitutional rights, Judge Doyle nonetheless found that a private conspiracy "to induce the state to violate one's First and Fourteenth Amendment rights is remedied by § 1985(2) and

(3)." The court acknowledged that the Appellee's use of the state court to attain an allegedly unconstitutional goal was not tantamount to action "under color of state law" as defined by § 1983, but found that a private conspiracy which takes advantage of the state judicial system or "brings the state into a position" that it is an unwitting, non-active participant in the alleged deprivation of rights constitutes that degree of state involvement as to satisfy the requirements of 42 U.S.C. § 1985. The "unwitting deprivation" of constitutional rights by the state was found by the actions of the sheriff's deputies in bringing the proposed ward before the probate judge pursuant to court order and in the court's appointment of the father as temporary guardian without jurisdiction or statutory authority to do so. Appendix at 64, 66.

REASONS FOR GRANTING THE WRIT

1. THE POINT DECIDED BELOW WAS EXPRESSLY RESERVED AND LEFT UNDECIDED BY THE SUPREME COURT.

In *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971), this Court expressly reserved the determination of the question which is presented in this case.

> "In identifying these two constitutional sources of Congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under §5 of the Fourteenth Amendment.[12] By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of this statute, there has been no occasion here to trace out its constitutionally permissible periphery."

In *Griffin v. Breckenridge*, this Court pointed out that

whether or not *Collins v. Hardyman*, 341 U.S. 651 (1951), was correctly decided *on its own facts* was a question with which the Court was not concerned. In *Collins v. Hardyman*, the defendants' conspiracy was purely private in nature and in no way associated with state or official action. In the instant case, the Tenth Circuit Court of Appeals relied predominantly on this Court's opinion in *United States v. Guest*, 383 U.S. 745 (1966), but fashioned a new rule of law equating "unwitting deprivation" and "tacit connivance" with active participation by a state actor. This point was expressly reserved by this Court in *Griffin v. Breckenridge* and has yet to be decided. This is a sound basis for issuance of the writ. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

2. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS AND PREVIOUS DECISIONS OF THE SUPREME COURT.

The Tenth Circuit Court of Appeals misconstrued, misapplied and misconceived this Court's reasoning in *United States v. Guest, supra.* See *Schlude v. Commissioner*, 372 U.S. 128, 130 (1962). There is a square conflict between the reasoning of the Circuit Court and this Court on the point of active participation versus unwitting connivance and there is a need for a uniform rule on this point. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962). To resolve this conflict of an important question of federal law which has not been, but which should be settled by the Supreme Court, this petition should be granted.

The only participation of the state in the activities complained of below was the alleged wrongful use of the judicial system and the Sheriff's Office in Oklahoma County,

Oklahoma. At no time did the Plaintiff allege that the probate judge did anything more than act in the judicial capacity to hear evidence and grant an Order of Temporary Guardianship, nor did he allege that the Sheriff of Oklahoma County did anything more than carry out an order of the Probate Court judge to bring the proposed ward before the Court for examination. The Probate Court's role in the case came to an end with the issuance of its order delivering the Plaintiff into the custody of his father as a temporary guardian.

Recognizing that no violation of Thirteenth Amendment rights or the right of interstate travel was alleged by the Plaintiff, the Tenth Circuit Court of Appeals looked to the Fourteenth Amendment as the applicable source of power to reach the conspiracy alleged. It then proceeded to find, however, adequate state involvement as a result of the "co-operation of the judge and the Sheriff's officers . . ." in the use of the state judicial system and in the Sheriff carrying out an order that the proposed ward be brought before the Court for examination. Appendix at 55. This equation is squarely in conflict with the prior holdings of this Court.

The Tenth Circuit Court of Appeals relied primarily on this Court's holding and reasoning in *United States v. Guest, supra.* In its companion case, *United States v. Price*, 383 U.S. 787 (1966) the defendant co-conspirators included three Mississippi law enforcement officials who conspired to release the victims from jail, intercept, remove and transport them to a certain designated place where the assaults took place. In *United States v. Guest, supra*, there were no state actors joined as defendant co-conspirators. What is critical to a correct reading of *Guest*, however, is that the Fourteenth Amendment protects the individuals only against state action,

not against wrongs done by individuals and *the degree of state action found sufficient in the case was the equivalent of active participation by the state*. 383 U.S. at 755. Justice Stewart noted that the indictment in fact contained an express allegation of state involvement by pointing out that one of the means of accomplishing the object of the conspiracy was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." *Id.* at 756. It was the *state* which allegedly created the false reports and thus initiated the arrests of the victims. In a very important passage, this Court pointed out that in *Bell v. State of Maryland*, 378 U.S. 226 (1964), three members of the Court expressed the view that a private person's invocation of state police and judicial action to carry out his own policy of discrimination was sufficient to create rights under the Equal Protection Clause in persons against whom racial discrimination was directed. Three other members of the Court strongly disagreed and three expressed no opinion at all. The Court intimated, however, that if the indictment in *Guest* charged no more that merely cooperative private and state action similar to that involved in *Bell v. State of Maryland* [the record was unclear as to the extent of official involvement], no Equal Protection Clause rights were created. Furthermore, *Bell v. State of Maryland, supra*, at least insofar as it relates to 42 U.S.C. § 1985(3), has been soundly addressed and satisfied by Justice Stewart's reasoning in *Griffin v. Breckenridge* that racial discrimination as a result of a private conspiracy is in and of itself actionable under the statute per the Thirteenth Amendment.

Most importantly, this Court in *United States v. Guest* pointed out that the allegation was broad enough to cover a charge of *active connivance* because the state made the

false reports or engaged in conduct tantamount to *official discrimination* as opposed to mere invocation of state police and judicial power by private citizens. Clearly, in the instant case, there are no allegations of active connivance or official discrimination by state actors, but mere utilization of the judicial system and the local law enforcement official carrying out the order of the court.

Notwithstanding the clear direction given by the Supreme Court in *Guest*, and the acknowledgment of the legislative history of the 1871 Civil Rights Act wherein Senator Edmunds stated that there was no intention in the Bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud or one man or set of men against another to prevent one getting an indictment in the state courts, the Tenth Circuit Court of Appeals proceeded to equate utilization of the state judicial system with "causing the state to participate and deprive the plaintiff of his liberty." Appendix at 50, 55. It has long been held in the various circuit courts which have addressed the question that mere utilization of the state judicial system does not make the state an active participant in any alleged deprivation of fundamental rights. *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Hall v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Sykes v. State of California (Department of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

The reasoning of the Tenth Circuit Court of Appeals presents a direct conflict between the decision of the Tenth Circuit and the previous opinions of this Court. The notion that sufficient state participation can be found where private

parties conspire "to induce the state to deprive an individual of his constitutional rights" by mere utilization of the state judicial system is clearly incorrect. No matter how the Circuit Court characterizes the *result* of the utilization of the state court system (private conspirators "cause the state to participate" or coerce the state to "unwittingly deprive the plaintiff of certain rights" or made the state a "silent partner"), the *activity* of the state is still completely and totally indirect: application to and utilization of the state court system. Such participation never has been the basis for satisfying the requirement of state involvement for the purposes of the Fourteenth Amendment, nor is there any legislative history to bear out such an interpretation as has been noted by several commentators.[1]

It must be noted that there is no allegation in the case below that the Probate Court judge shared the allegedly improper motives or in any way participated in an attempt to change certain beliefs of the Plaintiff. The Tenth Circuit strained to equate the conduct of a hearing before a state Probate Court and an Order of Temporary Guardianship placing the Plaintiff in the custody of his father with "participat[ion] in coercing a change in this adult's religious beliefs and it was but a prelude to what was to happen." Utilization of the state judicial system, absent some direct participation or sharing of the conspiratorial motives by the state judicial officer, is at best limited state involvement and not the

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[1] Vermeire, *Deprogramming From the Defense Counsel's Perspective*, 84 W. Va. L. Rev. 91, 111-19 (1982); Wildman, *42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 S.D. L. Rev. 317 (1980); Comment, *A Construction of Section 1985(c) In Light of Its Original Purpose*, 46 U. Chicago L. Rev. 402 (1979); Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 G.W.U. L. Rev. 239 (1977).

extensive type of participation discussed in *United States v. Guest.* The very essence of the incorrect analysis undertaken by the Tenth Circuit is borne out by its conclusion that although the appellant did not claim that the state conspired to deprive him of his constitutional rights, he did claim "that the state unwittingly deprived him of those rights" when the Sheriff's deputies carried out the court's order requiring the proposed ward to be brought before him and when the probate judge proceeded to appoint the father as a temporary guardian. Appendix at 66. This case presents a basic confrontation between two concepts which must be resolved: *Inducing* the state to allegedly violate a First or Fourteenth Amendment right by participating in no more than a judicial hearing cannot satisfy the requirement of active participation, active connivance or official discrimination.

3. THERE IS CLEARLY A NEED FOR A UNIFORM RULE ON THIS POINT.

The Tenth Circuit quoted Justice Stevens' separate concurrence in *Great American Savings & Loan Association v. Novotny,* 442 U.S. 366, 383-84 (1979), but clearly misinterpreted his meaning. Justice Stevens was pointing out that as to other privileges and immunities of citizenship such as those rights alleged to have been violated in the instant case, citizens are protected by the Constitution only against state action or conspiratorial action *with the state* that prevents or hinders the giving or securing of equal treatment. In footnote 5 to the concurring opinion, Justice Stevens pointed out that he paraphrased the statutory language because it sheds important light on the meaning of the entire section. *Id.* at 384, n.5. He went on to point out, however, that while § 1985(c) does not require the same requirement of action

under color of state law as does § 1983, "there still can be no claim for relief based on a violation of the Fourteenth Amendment *if there has been no involvement by the State.*" *Id.* This "involvement" as explained in *United States v. Price* and *United States v. Guest, supra,* must be active in nature. It cannot be merely tacit, unwitting or passive in the sense of the utilization of the state judicial system to bring about an end which is the object of an otherwise purely private conspiracy. Nor did the Tenth Circuit acknowledge Justice Powell's concurring opinion in the same case in which he noted this Court's dicta in *Griffin v. Breckenridge* that § 1985 was not intended to apply to all tortious, conspiratorial interference with the rights of others, "Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action." *Id.* at 381.

4. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1985.

Three distinct approaches in resolving this issue have been endorsed in the various Circuit Courts of Appeals. They are as follows:

A. The requirement of state involvement under § 1985 is co-extensive with that required under § 1983, although the language of the two sections differs. THIRD CIRCUIT, *Phillips v. Trello,* 502 F.2d 1000 (3rd Cir. 1974); FOURTH CIRCUIT, *Bellamy v. Masons Stores, Inc.,* 508 F.2d 504 (4th Cir. 1974); SEVENTH CIRCUIT, *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972); EIGHTH CIRCUIT, *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975); TENTH

CIRCUIT, *Taylor v. Nichols,* 558 F.2d 561, 564 (10th Cir. 1977).

B. Although not co-extensive with the state action requirement under § 1983, some degree of active state participation beyond mere tacit connivance or passive cooperation is required. SECOND CIRCUIT, *Weise v. Willow Tree Civic Association,* 467 F. Supp. 803, 813-14 (S.D.N.Y. 1979) *citing the absence of clear direction in Weiss v. Syracuse University,* 522 F.2d 397 (2nd Cir. 1975); SIXTH CIRCUIT, *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973); NINTH CIRCUIT, *Lopez v. Arrowhead Ranches,* 523 F.2d 924 (9th Cir. 1975).

C. Purely private conspiracies with no state involvement whatever are actionable under § 1985. THIRD CIRCUIT, *Richardson v. Miller,* 446 F.2d 1247 (3rd Cir. 1971); EIGHTH CIRCUIT, *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971).

Furthermore, there is a conflict within the same circuit in at least three instances. Compare the Tenth Circuit's opinion in the instant case with its opinion in *Taylor v. Nichols, supra.* The same is true within the Eighth Circuit; compare *Means v. Wilson, supra,* with *Action v. Gannon, supra,* and the Third Circuit; compare *Phillips v. Trello, supra,* with *Richardson v. Miller, supra.*

There are a considerable number of suits pending in the lower courts which will turn on the resolution of this issue. See *Massachusetts Trustees v. United States,* 377 U.S. 235, 237 (1964). The timing is now propitious to resolve this long-standing question of substantive federal statutory interpretation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,
MONBLEAU, VERMEIRE & TURLEY, P.C.

By
Albert R. Vermeire
3443 North Central Avenue, Suite 1510
Phoenix, Arizona 85012
Attorneys for Petitioner Howard

and

LOONEY, NICHOLS, JOHNSON & HAYES
By John B. Hayes
P. O. Box 468
Oklahoma City, Oklahoma 73101
Attorneys for Petitioner Trauscht

October, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner herein, hereby certifies that on the 18th day of October, 1982, he caused to be served the foregoing Petition for Writ of Certiorari on all parties to this appeal by mailing copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

Mr. John C. McMurry
625 N.W. 13th Street
Oklahoma City, Oklahoma 73103
Attorney for Respondent Taylor

Mr. William A. Johnson
Citizens Tower Building
2200 Classen Boulevard, Suite 1450
Oklahoma City, Oklahoma 73106
Attorney for Petitioners
Gilmartin, Scharff and Alexanders

Albert R. Vermeire